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Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights, by Steven D. Roper and Lilian A. Barria

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Book Review

Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights, *by* Steven D. Roper and Lilian A. Barria

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Reviewed by: Zachary D. Kaufman

Steven D. Roper and Lilian A. Barria, professors in the Department of Political Science at Eastern Illinois University, are frequent collaborators on scholarly work concerning criminal tribunals. Their co-authored articles and joint conference presentations on assorted aspects of this topic have culminated in *Designing Criminal Tribunals*, a book that examines various *ad hoc* tribunals, primarily those created since the end of the Cold War. These tribunals include the United Nations International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), both international tribunals; the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Crimes Panel for East Timor (SCPET), all mixed tribunals; and the Indonesian Human Rights Court (IHRC), a purely domestic court.

Observing that "[i]nternational law, tribunals and law enforcement mechanisms have developed unevenly in the 20th century as a reflection of political realities,"[1] Roper and Barria argue "that legal concerns are embedded within a political process (either domestic or international) in which rights and obligations are redefined based on political necessity."[2] This point, vocalized by many others in the literature on international criminal law and transitional justice, reflects a realist view of international relations that highlights the epiphenomenal nature, or secondary role, of international law vis-à-vis world politics. And the authors certainly make

1. STEVEN D. ROPER & LILIAN A. BARRIA, DESIGNING CRIMINAL TRIBUNALS: SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN RIGHTS 1 (2006).
2. *Id.* at 2.

their case, by convincingly showing that the general evolution in tribunal construction since the early 1990s—from purely international to mixed to purely domestic—reflects states' changing preferences based on matters quite separate from principles of law and justice, such as financial considerations and assertions of state sovereignty.

While *Designing Criminal Tribunals* provides important information and analysis about several critical aspects of its six key case studies, including their financial bases and completion strategies (Chapters Five and Six, respectively, which are the two strongest chapters), it suffers from two major weaknesses. The first is that the book adds little original research to this important topic. By drawing heavily upon secondary sources, Roper and Barria deliver little more than a summary of the existing literature on this topic.

The second major weakness of the book is that it is methodologically unsound. The logic is arbitrary, and readers are left pondering the true focus of the project and its rationale. One methodological problem of this book is its narrow transitional justice *option* selection. Why the authors chose to focus on examining *only ad hoc* tribunals, given the self-described purpose of their project, remains unclear. Roper and Barria rightly argue, "To hold individuals accountable for their crimes under international law in a meaningful way requires the creation and the implementation of mechanisms designed to provide justice."[3] However, the authors proceed to announce that they will exclusively focus on *ad hoc* tribunals. Certainly, there are many other ways to address suspected international criminals, but Roper and Barria make no effort to explain why the essentially contested concepts of "accountability" and "justice"—which the authors do not acknowledge as such until the end of the book[4]—are defined so narrowly, or whether alternative mechanisms are somehow less "meaningful" in providing those objectives.

For example, prosecutorial mechanisms other than *ad hoc* tribunals do exist, such as permanent domestic courts claiming universal jurisdiction over individuals (as in the recent attempt by a Spanish judge to arrest and extradite from the United Kingdom the now late Chilean General Augusto Pinochet). Truth commissions have also been popular and effective means of promoting certain objectives of transitional justice, such as establishing a historical account of heinous crimes. Examples of such institutions include the South African Truth and Reconciliation Commission and its less famous counterparts formed or at least contemplated in Argentina, Bolivia, Chile, Ecuador, El Salvador, Guatemala, Panama, Peru, and three of the regions under consideration in this book (East Timor, the former Yugoslavia, and Sierra Leone). These alternative prosecutorial, civil, and non-legalistic transitional justice mechanisms offer procedural and substantive benefits, as well as drawbacks. A more complete analysis of the political and practical reality a society faces when confronting its past

3. *Id.*
4. *Id.* at 95.

would include an explanation of whether other transitional justice options were considered and why plausible alternatives were rejected.

A second methodological weakness of the book is its narrow transitional justice *case* selection. It is unclear why the authors chose to focus on examining *these ad hoc* tribunals, also given the summary of their enterprise. Why did the authors not also explore the International Military Tribunal (IMT, also known as the Nuremberg Tribunal), the International Military Tribunal for the Far East (IMTFE, also known as the Tokyo Tribunal), and other *ad hoc* tribunals in greater detail? Furthermore, why did the authors choose to analyze only one purely domestic response to human rights violations, the IHRC?

The back cover informs readers: "This book traces the development of international humanitarian law especially since World War II and focuses on the role of the international community in crafting international and mixed war crimes tribunals." This description suggests an examination of the establishment of the IMT and the IMTFE with as much rigor and space as it does the ICTR, the ICTY, the SCSL, the ECCC, and the SCPET. Yet Roper and Barria fall victim to the trend of much secondary literature on this topic by not committing more of their efforts to exploring and reflecting upon the significance of the twin post-World War II tribunals. Indeed, the authors devote less than two pages to documenting the establishment of the IMT and only one page to the creation of the IMTFE.[5] Both efforts offer disappointingly—and, in terms of the book's purported goal, detrimentally—brief summaries of the chronology of events; neither provides any new information or analysis of the circumstances that led to the creation and operation of these tribunals. Especially because the IMT and the IMTFE were the first *ad hoc* international criminal tribunals—and since they served as such important precedents for the later tribunals which are more of the focus of the book—a lengthier analysis of their etiology and legacy would have strengthened the book's argument. After all, the path dependency formed by these two models provides a compelling explanation for the design of the later tribunals and also serves as a starting point for analyzing the differing forms those later tribunals took.

The book's preface opens with the claim that by spring 2002 "no volume explored the origins, the structure and the influence of all the newly created international and hybrid criminal tribunals."[6] This description of the genesis of *Designing Criminal Tribunals* implies that the book would be concerned with more than just *ad hoc* tribunals and that the world's first permanent international war crimes tribunal, the International Criminal Court (ICC), therefore should have been a major case study. But even though the ICC was not a case study of *Designing Criminal Tribunals*, this permanent tribunal with potentially worldwide jurisdiction undermines the authors' attempt to generalize the recent evolution of

5. *Id.* at 6-8.
6. *Id.* at vii.

tribunal construction as tilting towards domestic courts. Where the ICC *is* briefly mentioned, the authors make an erroneous assertion, claiming "Once the ICTY and the ICTR fulfill their mandates, all future international prosecutions involving the criminality of individuals will be adjudicated by the ICC."[7] In fact, we have many reasons to believe that alternative transitional justice mechanisms will continue to be used, including that the ICC will be limited by its own jurisdiction, capacity, and discretion in the number and type of cases it will try.[8]

Other recently created tribunals also receive little or no mention in the book. Roper and Barria claim that their book "examines all the *ad hoc* tribunals created since the early 1990s"[9] and then proceed to focus on just six. The reader is left wondering why other significant *ad hoc* tribunals, particularly the Iraqi Special Tribunal (IST), are not discussed. The IST, which recently completed a controversial trial of Saddam Hussein by sentencing him to death by hanging, is a particularly curious omission since the book's very first paragraph mentions Saddam twice. The authors argue that his trial, along with that of Slobodan Milošević, "represent[s] flawed justice in which either the defendant has been able to prolong and subvert the process or is a victim of 'victor's justice'."[10] For a book that dedicates an entire chapter to understanding the effectiveness of international, hybrid, and domestic tribunals, this comment misleadingly implies that the IST would figure prominently in the narrative.

Moreover, neither of the descriptions included in the back cover or preface mentions domestic tribunals, and yet the IHRC is one of the book's six case studies. Either these descriptions should have explicitly included domestic tribunals or the book should have limited the discussion of the IHRC. If the former route were taken, more domestic courts that have and have not operated alongside international and hybrid tribunals should have been explored. As is, the highly controversial *ad hoc* U.S. military commissions are not mentioned and the War Crimes Chamber in the Court of Bosnia and Herzegovina and Rwanda's *gacaca* courts are discussed only briefly.

The book's preface may help explain the narrow selection of case studies in this volume. The authors note that they conducted fieldwork in The Hague, Cambodia, and Indonesia. These experiences would naturally direct their work towards the ICTY, based in The Hague; the ECCC, the SCPET, and the IHRC; and, perhaps also the ICTR, which shares the ICTY's appeals chamber. But there is no indication that the authors even attempted to conduct fieldwork in Africa, where two of their case studies are located. To promote the intellectual integrity of this project, and to better explain their case selection, the authors should have admitted they chose case studies with which they were most familiar.

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7. *Id.* at 96.

8. *See* Zachary D. Kaufman, *The Future of Transitional Justice*, 1 ST. ANTONY'S INT'L REV. 58, 71-72 (2005).

9. ROPER & BARRIA, *supra* note 1, at 2.

10. *Id.* at 1.

All of this arbitrariness could have been resolved by expanding the book. The current edition, excluding the appendices, is not even 100 pages. Readers could certainly benefit from a revised edition that considers additional cases or at least offers a more compelling explanation for why this work is so narrowly focused.

By focusing only on a subset of cases within a subset of options, Roper and Barria restrict the universe of data they collect and the observations they share. Of course, perhaps no single volume could address the myriad transitional justice institutions and experiences. But even considering the book's actual content, it is still problematic. For example, the case study of the ICTR is poorly developed. Although, as the authors describe, Rwanda's Organic Law initially divided suspects into four categories,[11] those classifications have now been consolidated into three.[12] The custody battle between the ICTR and the Rwandan government over defendants arises not only because of the absence of a death penalty option in the UN tribunal, as Roper and Barria speculate,[13] but also because the Rwandan government has had concerns over the ICTR's operation. For example, the ICTR has previously hired genocide suspects as staff members,[14] and judges have failed to treat witnesses with the respect they deserve, on one occasion laughing at a witness testifying about the rape she suffered.[15] The Rwandan government's initial objections to the ICTR were not merely based on the tribunal's temporal and subject-matter jurisdictions and the absence of the death penalty, as the authors claim.[16] From the Rwandan government's perspective, the ICTR did not include enough trial chamber judges and problematically shared an appeals chamber and chief prosecutor with the ICTY; the UN Security Council member states that participated in the Rwandan conflict would wrongly have power to propose and vote on judicial candidates; suspects and convicts would inappropriately be held in states outside of Rwanda; and the ICTR should have been located in Rwanda instead of in neighboring Tanzania.[17]

Beyond the flawed methodology and analysis, the book is marked by general sloppiness. The editing is poor, as evidenced by several arithmetic, spelling, and nomenclature mistakes.[18] *Designing Criminal Tribunals*, published in 2006, also refers to past events as occurring in the future.[19]

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11. *Id.* at 25, 78.

12. *See* Phil Clark, *Hybridity, Holism and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. (forthcoming 2007).

13. ROPER & BARRIA, *supra* note 1, at 25.

14. *See* Victor Peskin, *Rwandan Ghosts*, LEGAL AFFAIRS, Sept.-Oct. 2002, at 21.

15. *See* Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 NEW ENG. J. INT'L & COMP. L. 119, 130 n.55 (2005).

16. ROPER & BARRIA, *supra* note 1, at 23-24.

17. U.N. SCOR, 49th Sess., 3453d mtg. at 13-16, U.N. Doc. S/PV.3453 (Nov. 8, 1994).

18. For example, the authors refer to four international tribunals, whereas the book analyzes five. Roper & Barria, *supra* note 1, at 3. Furthermore, throughout the book, the authors mistakenly refer to the ECCC (the proper name of this tribunal, as indicated in the primary documents in Appendix F) as the Extraordinary Chambers for Cambodia (ECC).

19. For example, the authors claim the ECCC is "the only tribunal that will be established

This latter problem can be explained by the fact that much of the book is directly reproduced from the authors' previous work. Roper and Barria co-authored related articles in *Human Rights Review*, the *International Journal of Human Rights*, and the *Journal of Human Rights*,[20] journals they thank "for allowing us to use ideas from these publications."[21] More than merely *reusing* their ideas, however, much of the book is a verbatim *reprint* of these recently published articles. While scholars often draw upon their previous work in later anthologies, they usually do so with updated material and new insight, or only as part of a greater work. The minimal changes the authors made from earlier iterations of their work, added to the fact that the book is relatively short, raise the question: why did the authors not add more value to their previous publications?

The authors should be commended for raising awareness about the phenomenon and challenges of *ad hoc* tribunals. As Roper and Barria rightly point out in their final chapter, the effectiveness of these tribunals is difficult to assess because there are myriad rationales for and expectations of them, which may sometimes conflict or be unrealistic. The authors are also appropriately sensitive to contextual circumstances, arguing that their case studies "demonstrate that there is no one model that fits all situations."[22]

However, *Designing Criminal Tribunals* adds little value to the literature on international criminal law and transitional justice because Roper and Barria rehash and regurgitate so much of others'—and their own—work. Furthermore, the book is confused about its exact purpose. In not clearly providing a rationale for its chosen case studies, the book reads as a disjointed set of reflections on a topic that is too important not to treat more rigorously. Roper and Barria's next book together is entitled *The Development of Institutions of Human Rights*. Such a similarly broad and ambitious subject will require an amount of documentation and a depth of analysis lacking in their first co-authored volume.

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after the entry into force of the ICC in 2002." *Id.* at 30. Furthermore, this statement has been proven false, as evidenced by the fact that the IST was created in 2003.

20. Lilian A. Barria & Steven D. Roper, *Assessing the Record of Justice: A Comparison of Mixed International Tribunals versus Domestic Mechanisms for Human Rights Enforcement* 4 J. HUM. RTS. 521 (2005); Lilian A. Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT'L J. HUM. RTS. 349 (2005); Lilian A. Barria & Steven D. Roper, *Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia*, 7 HUM. RTS. REV. 5 (2005).

21. ROPER & BARRIA, *supra* note 1, at viii.

22. *Id.* at 94.

Book Review

Law, Infrastructure, and Human Rights, *by* Michael B. Likosky

Publisher: Cambridge University Press (2006)
Price: $35
Reviewed by: Rubina Madni

Shortly after Royal Dutch Shell first discovered natural gas in Peru in 1980, the Peruvian government contracted with Shell and Mobil to exploit the reserves, with the hopes of bringing great wealth to the impoverished South American country by making it a net exporter of hydrocarbons. The project involved the construction of a pipeline that would cut through the land of many indigenous communities in the Amazon rain forest, however, and human rights activists mounted numerous campaigns against the gas companies and banks that financed the project. Shell and Mobil eventually pulled out of the project due to disagreements with the Peruvian government over issues like pricing, but the concern for human rights that came to the forefront during this time remained a prominent issue connecting to and sometimes clashing with Peru's development agenda.

The advancement of human rights and standards of living are predicated on the development of infrastructure, which allows access to such basic necessities as water, shelter, electricity, and food. The relationship between infrastructure and human rights is not perfectly harmonious, however, because in the course of developing infrastructure projects, human rights—such as those of indigenous Amazon communities during the above-mentioned Camisea project—are often compromised. Michael B. Likosky's *Law, Infrastructure, and Human Rights* analyzes the complex interplay between human rights and the development of infrastructure projects through transnational public-private partnerships (PPPs).

Following a thorough explanation of the technical aspects of the finance, construction, and operation stages of infrastructure projects, Likosky examines how human rights concerns are handled in the context of international privatized infrastructure projects. Analyzing the linkages between PPPs, compound corporations, and human rights risks through

five case studies—Iraq, antiterrorism, banks, EU enlargement, and antipoverty—Likosky explores how legal strategies address development-generated human rights concerns in practice, and suggests ways in which the nature of the relationship between transnational PPPs and human rights can be improved.

Some explanation of terminology is called for here, and Likosky provides it. A PPP is an infrastructure project that is privatized but includes a substantial public element. Likosky's particular focus is on transnational PPPs, infrastructure projects that include a foreign element, such as a bank or company. The companies which execute the PPP's work—Shell and Mobil under the Peruvian scheme, for example—are known as "compound corporations." The concept of "human rights risk" involves the probability that human rights considerations will adversely interfere with the implementation of an infrastructure project. (From the perspective of affected communities, of course, the concern is whether infrastructure projects will interfere with their human rights.) Several "risk mitigation strategies" are available to mitigate the potential harm posed to an infrastructure project by human rights risks: among them, transnational litigation, NGOs that target companies directly, market-based strategies such as ethics codes, and political risk insurance. For instance, when human rights NGOs and community groups targeted the Camisea project, Shell and Mobil responded with an innovative and comprehensive plan to address human rights concerns, prevent the project from disrupting the lives of the indigenous villages, and solicit input about the project from local communities.

While Likosky presents the classic story of human rights strategists reacting to a PPP in the context of the Camisea project, he shows that opposition to PPPs is not always rooted in concern for human rights. In the chapters on postwar Iraq and antiterrorism, Likosky shows that terrorist groups, whose goals are clearly counter to those of human rights groups, also target PPPs in order to garner social change; in turn PPPs can at times constitute one element of an antiterror strategy. In Iraq, for instance, the United States government responded to insurgents' attacks on infrastructure projects by implementing non-military counterinsurgency practices, including the subcontracting of infrastructure projects to Iraqi companies so as to provide Iraqis jobs. This strategy, embracing the use of transnational PPPs, was a break from the customary U.S. practice of subcontracting exclusively to American firms.

One of Likosky's key arguments is that the existence of a centralized authority facilitates the work of human rights strategists. In his chapter on EU enlargement, he notes that since the EU will assess the economic and social impacts of projects, it will be easier for human rights activists to launch effective campaigns aimed toward a centralized authority, as opposed to individually targeting each of the numerous different actors—domestic and foreign banks, governments, and multinational corporations—that are often involved in PPPs. In the aggregate, Likosky lauds the move toward centralization as a step towards greater respect for

human rights norms in the financing, construction, and operating stages of infrastructure projects in new member states.

In the book's final chapter, this concept is carried into his policy recommendation for a centralized Human Rights Unit (HRU) to be carried out under the auspices of the United Nations. The HRU, he suggests, should handle all human rights issues that arise under the context of transnational PPPs and should act as a decisional forum, setting human rights standards for international infrastructure PPPs and monitoring compliance with those standards. Currently, human rights NGOs and community groups target PPP planners through human rights risk strategies, driving reform and setting new standards for the human rights implications of infrastructure projects on a case-by-case basis. This system is deficient because, while project planners may agree to certain standards, their compliance is not adequately monitored. Moreover, as demonstrated by the diverse array of case studies that Likosky examines, infrastructure projects are carried out in a broad array of contexts and it is not always clear what the appropriate human rights standard is or how a human rights standard should be implemented in a particular project. The HRU would remedy the current situation: project planners would be closely scrutinized, their compliance with human rights norms evenly monitored and enforced. A common standard would exist, but could be adapted by experts to diverse contexts such as reconstruction in Iraq or EU enlargement.

Along similar lines, the HRU would address uneven human rights standards between countries. In the second phase of Camisea, after Shell and Mobil's withdrawal, NGOs focused their opposition to the project by targeting the banks that financed it. They managed to block financing from the United States Export-Import Bank, which has the highest human rights standards of all export agencies. But project planners managed to secure funds from other countries, where such funds were not tied to human rights scrutiny. Under Likosky's proposal, a project like Camisea would be submitted to the HRU in order to produce an unvarying human rights risk assessment of the project.

While the HRU is a noble aspiration with scores of potential benefits, it is unclear from Likosky's proposal whether the HRU could change the practices of states that reject the conditioning of development aid on human rights. China, for instance, doles out money sans human rights scrutiny across Africa in order to meet its tremendous need for resources. China's own dismal domestic human rights record is mirrored in its foreign policy, where lack of concern for human rights standards is manifested in China's ongoing support for the Sudanese government despite charges of genocide. It is overly optimistic to expect that the regularized, aspirational human rights standards devised by the HRU would be respected by the Chinese government in its financing of infrastructure projects. While the HRU policy is promising for many circumstances, its efficacy in helping to actualize human rights in the context of PPPs that are executed by habitual human rights offenders is

doubtful.

Alongside the perhaps excessive idealism evident in Likosky's Human Rights Unit proposal, several other weaknesses temper what is otherwise a thought-provoking analysis of the relationship between infrastructure and human rights. For instance, in attempting to explain how governments use PPPs in response to terrorist threats in Chapter Five, he fails to define some key terms upon which his argument turns. He argues that governments can use PPPs in counterterrorism by reaching out to Islamic countries, building contractual relationships with them so as to reduce terrorist threats from the region. He further proposes the financing of projects through "Islamic techniques" premised on PPPs.

A book on human rights should ideally be attuned to the nuances inherent in a dynamic and complex segment of the global village. What are "Islamic finance techniques" and how might they differ from other forms of financing? Moreover, what are "Islamic funds"? Are they funds that are raised through the *Zakat*, the alms-giving that is compulsory on Muslims? Or are they funds that are generated in predominantly Muslim countries? Likosky uses blanket terms such as these in his argument but fails to define them, thus weakening the clarity of his argument.

From the perspective of an individual who has a basic understanding of the theories of human rights law and is seeking straightforward introduction to the interplay and tension between human rights law and infrastructure projects, another major weakness of the book is its overly technical explanation of transnational PPPs. While the first two chapters about the technical framework are undoubtedly crucial, Likosky devotes too much time expounding on technical details of infrastructure projects, their financing, and the historical trajectory of PPPs. This discussion is largely unhelpful in furthering his arguments on infrastructure and human rights and risks losing the more legally minded reader.

Despite these weaknesses, *Law, Infrastructure, and Human Rights* deftly analyzes how transnational PPP projects, executed by compound corporations in very diverse contexts, are adapted so as to respect human rights norms in response to efforts by targeted human rights risk strategies. After reading the case studies, the reader is able to fully appreciate the complex human rights problems involved in transnational PPPs and the difficulties that present themselves to human rights activists in addressing those concerns. The solution Likosky presents—a Human Rights Unit to evaluate and monitor PPPs—is promising, but not entirely adequate to address the universe of actors willing to compromise human rights in the interests of financial benefits.

Book Review

Law and Disorder in the Postcolony, *edited by* Jean Comaroff and John L. Comaroff

Publisher: University of Chicago Press (2006)
Price: $28
Reviewed by: Sarah Mehta

On February 8, 2007, 6-year-old João Helio Fernandes Vieites was murdered in Rio de Janeiro when armed teenagers carjacked his family's car at a traffic light. As the child struggled to get out of his seatbelt and out the open car door, the assailants drove off, dragging João Helio's body for several miles before abandoning the dismembered remains.

In recounting this horrific murder, media accounts—particularly the international reports—fixated on the overwhelming outcry of the city's inhabitants. In a city inured to violence, reporters asked, why the exceptional outrage in this particular case? Stepping back even further, how did collective dispassion become the predicted response to sensational violence and police paralysis?

The collected essays in *Law and Disorder in the Postcolony* intervene in this conversation, further complicating perceptions of public cynicism towards "law and order" in postcolonial societies. Disorder, as utilized by the authors, denotes endemic lawlessness and is illustrated by violence and extra-legal activities. But this crisis in governance does not signify indifference towards law, its power and institutions. Through case studies conducted in a diverse spectrum of postcolonial states, the authors demonstrate that law and its accoutrements continue to capture popular imaginings, despite repeated failures to reflect or govern the local realities. One of the ironies that the authors attempt to explicate is the fact that mounting criminal violence and illicit economic practices are not a "rejoinder" to the law, nor do they prove popular disillusionment with the normative or ethical power of law. As editors Jean Comaroff and John L. Comaroff claim in their introduction, "[L]aw has been further fetishized, even as, in most postcolonies, higher and higher walls are built to protect the propertied from lawlessness, even as the language of legality insinuates

itself deeper and deeper into the realm of the illicit."[1] "Legality," they claim, is the measure of ethical and legitimate action; but governments no longer have a monopoly on the vocabulary and provision of law and rights. Postcolonial states attempt to establish sovereignty armed with sophisticated jurisprudence and constitutions; extralegal or criminal actors simultaneously foster "the counterfeiting of a culture of legality." The distinction between licit and illicit actors collapses as states increasingly outsource responsibility for government services like security to private actors; responding to the retreat of the state, extralegal actors mimic the state and the market "by providing protection and dispensing justice."[2]

One reading of the persistence of disorder and criminality in postcolonial states blames existing government institutions as faulty or insufficiently democratic, absent a "culture of legality." This theory rests on the notion that the development of such a "culture," with all the legitimizing trappings of a functioning judiciary, democratically elected government, and constitutionally enshrined civil rights, will buttress society against criminality and the slippery slope to anarchy. Several authors in this volume illustrate the uncomfortable "coincidence of democratization and criminal violence"[3] and the growing realization that this comforting dichotomy—of criminal violence on one side and rule of law on the other—is illusory. A more insidious narrative, iterated in many of the essays, points to the prevalence of criminal violence and corruption in the United States, Russia, the Netherlands and other industrialized nations supposedly immune to the flagrant criminality seen in postcolonial states; the more visible and globally condemned criminality in postcolonial states, then, is not a temporary stage on the path to "mature" democratization.

Democracy does not automatically end violence. If anything, the case studies suggest that the arrival of a democratic state signals the end of "legitimate violence" (of a social movement against a shared political target) and its replacement with unsanctioned and unstructured forms of violence. Indeed, the democratic state and its legitimizing activities can themselves serve as the amphitheatre for further violence. Teresa P. R. Caldeira notes that in Brazil, despite the extension of political rights to inhabitants of "the periphery", the state has proved incapable of providing physical safety, particularly for black men.[4] Even with the expansion and growing sophistication of civil rights in Brazil, the language of rights and with it, state protection, has been limited by class and race. The argument is not that democracy independently produces violence or a contraction of rights; rather, democracy provides new tools that empower *some* of its

1. JEAN COMAROFF & JOHN L. COMAROFF, INTRODUCTION TO LAW AND DISORDER IN THE POSTCOLONY 22 (Jean Comaroff & John L. Comaroff eds., 2006) [hereinafter LAW AND DISORDER].

2. *Id.* at 34.

3. *Id.* at 2.

4. Teresa P. R. Caldeira, *I Came to Sabotage Your Reasoning!: Violence and Resignifications of Justice in Brazil, in* LAW AND DISORDER, *supra* note 1, at 102, 136-38.

beneficiaries to exclude others from state protection. These "others" tend to be those most in need of state support and an affirmative declaration of their equality as rights-bearing citizens. For the already marginalized, democracy might constitute no more than another procedure for exclusion.

Looking at the iconic moment of democratic affirmation—the election—Achille Mbembe contests the normative conception of politics as "a means of rejecting war and sublimating conflict and violence"[5] and elections as performative proof that violence has been replaced as the "collectively validated procedure to vie for power."[6] Instead, elections provide another moment of provocation: "The liturgy meant to symbolize the overtaking of conflict and violence turns out to be the specter that, paradoxically, continues to haunt society, bringing dissension to the heart of the 'community,' in the form of threat of impending war or of fraud or of division and discord."[7] In Nigeria today the stage is set for the archetypal political violence that Mbembe evokes; a month before the elections, dozens of people have already been killed in political attacks.

Pervasive criminal activity does not, however, entail a complete rejection of law, the market or other forms of social collectivity. The elusiveness of a bright-line notion of "the lawful" complicates censure of some activities as criminal. Janet Roitman's interviews with smugglers in the Chad Basin demonstrate the inappropriateness of a rigorous dichotomy between licit and illicit activities. For smugglers operating across the boundaries of Chad, Sudan, Nigeria, Cameroon, Niger and Central African Republic, the distinction between legal and illegal trading is technically and even morally irrelevant. Allegedly lawful actors like customs officials, the police, and businessmen routinely engage in illegal economic transfers like bribes, and licit activities are not radically different from illicit ones; "military refugees," i.e. soldiers no longer needed by formal national armies, easily become mercenaries or join "private" security forces, trading the same weapons and participating in the same activities. Roitman is careful to point out that the various participants in this informal sector do not position themselves in opposition to the state's moral and legal authority via the creation of a parallel, rival political regime. Instead, she suggests, the smugglers/traffickers/bandits, "seek a certain mode of integration by partaking in recognized modes of governing the economy."[8] Perhaps more disturbingly, Rosalind C. Morris invokes a similar situation in the democratic state of South Africa, where well-established legal institutions and actors have not been able to contain chronic violence. According to Morris, declining legitimate *political* violence coincides with the replacement of the police with private security companies and

5. Achille Mbembe, *On Politics as a Form of Expenditure, in* LAW AND DISORDER, *supra* note 1, at 299, 312.

6. *Id.* at 313.

7. *Id.* at 313-14.

8. Janet Roitman, *The Ethics of Illegality in the Chad Basin, in* LAW AND DISORDER, *supra* note 1, at 247, 259.

"incompletely commercialized vigilante forces."[9]

One of the most subtle but compelling themes of this collection is the elusiveness of any correlative story about licit and ethical activities. This is not a book about postcolonial civil disobedience, and the authors successfully resist any temptation to look to extralegal institutions, actors, or economies as sites of civic resistance. In the absence of justifiable and meaningful authority, non-state actors emerge to fulfill some of the state's traditional roles. But the collected stories in this volume reveal that the host of ready successors to the state—i.e. private corporations, religious organizations, militias, gangs, transnational smuggler networks, and so on—do not attempt to establish themselves as more democratic or even effective replacements to collapsing state authority.

Nancy Scheper-Hughes offers a haunting account of the hunger for effective authority in Timbaúba, Brazil, where she has worked with street children for over two decades. Her essay traces the cycle of violence that first causes the children's homelessness and victimization and later engulfs them as perpetrators of this same terror until their eventual, and almost inevitable, murder at the hands of death squads (informal vigilante groups). These groups are shielded by community members and espoused as *justiceiros* or "representatives of popular justice"[10] in part out of gratitude for the protection the death squads provide, in part due to a general endorsement of these social cleansing (*limpeza*) campaigns. This tragic collusion of the poor with the "authors of their own extrajudicial executions"[11] illustrates a troubling and desperate attempt to create some order—even an unjust one—in the absence of legitimate and concerned state authority.

In situations where the state resists its increasing insignificance as rule-maker and rights-giver and attempts to confront its rivals directly, crisis erupts where the modern state's resource base and vocabulary are not equipped to tackle local conflicts and win. Peter Geschiere exposes the limits of the Cameroonian judiciary in the face of resurgent witchcraft. The state feels compelled to take action against the leaders of witch-hunts in order to reassert its primacy as the "law and order" authority but is not equipped to establish effective command. To apprehend the leaders of witch-hunts, the state must first criminalize some of their activities; this project requires the assistance of local experts in magic (*inyanga*), whose work and authority is often indistinguishable from the witchcraft they are hired to condemn. In partnering with these questionable authorities, the state damages its prestige in the eyes of its populace, who expect that "the new government should know what to do about witchcraft."[12] Worse still,

9. Rosalind C. Morris, *The Mute and the Unspeakable: Political Subjectivity, Violent Crime, and "the Sexual Thing" in a South African Mining Community, in* LAW AND DISORDER, *supra* note 1, at 57, 83.

10. Nancy Scheper-Hughes, *Death Squads and Democracy in Northeast Brazil, in* LAW AND DISORDER, *supra* note 1, at 150, 169.

11. *Id.* at 157.

12. Peter Geschiere, *Witchcraft and the Limits of the Law, in* LAW AND DISORDER, *supra* note 1, at 219, 221.

the state displays this handicap in its own forum of authority—the court—thus undermining the standing of that institution.

As the state's ambit of authority and activity contracts, the space for extra-legal activities expands. Activities outside the legally permissible sphere increasingly constitute the majority of economic, social and political activities. Writes Mbembe: "To the fragmentation of public power there will respond, like an echo, the constitution, multiplication, and dissemination of nodes of conflict within society. New arenas of power will gradually emerge as survival imperatives come to emphasize the increasing autonomy of the spheres of social and individual life."[13] This autonomy, Mbembe suggests, is less demonstrative of a vibrant civil society than of the retreat of conventional public authority; the subsequent void is readily filled by actors who need not claim to be transparent or accountable.

For a legal audience, this collection of anthropological essays might beget the question, "What's law got to do with this?" The anthropologists contributing to the book ask the same thing: what *does* law have to do with life, security, and democracy for inhabitants of postcolonial nation-states? Why the insistence on law and its institutions when their actual relevance and practice seems so elusive?

These questions, often reiterated and complicated in the articles, are not satisfactorily answered. The essays are provocative and richly descriptive in their narratives; but overall the authors settle for a comparatively thin explanation of the postcolonial obsession with law as aspirational in the face of pervasive disorder. The concepts of legality bandied around by the authors and their informants form a spectral (omni-) presence hovering over the narratives; yet we learn little about the legal machinery, actors, and mobilizations to which they are attached. This gap between Law as an icon and law as a program or tool is in part the point of the book but is still dissatisfying for a reader that wants to know where law can be rectified and revitalized as a source of social justice and not simply a spectator to its own demise.

The protests after João Helio's death in Rio de Janeiro suggest a desire for law to live up to its transformative power as champion of social justice. Even if the law has yet to corroborate these aspirations, it remains the only affirmative tool available absent more compelling alternatives.

13. Mbembe, *supra* note 5, at 311-12.